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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ERICH VADEN, Plaintiff and Appellant, v. OUTFITTER VENTURES, LLC, et al., Defendants and Respondents.	H044130 (Santa Clara County Super. Ct. No. 1-12-CV-237529)

Defendant Val Valden and his then wife Lilli Rey together formed a venture capital fund, whose name was later changed to Outfitter Ventures, LLC (Outfitter). Val's younger brother, plaintiff Erich Valen,[1] went to work for defendant Outfitter, first as an independent contractor and then as an employee. Erich was eventually laid off in February 2010 after working for Outfitter for a number of years. Erich sued defendants Outfitter and Val in December 2012, claiming, among other things, that Outfitter had not, as promised in 2004, paid him 25 percent of the company's "carry"—which was alleged in the complaint to be "the net profit on investments Outfitter [had] made after deduction for costs"—in exchange for his continuing to work for the company for a period of five years. Following summary adjudication of the second through the seventh causes of action (Code Civ. Proc., § 437c)[2] and the dismissal of the first cause of action at Erich's request, judgment was entered in favor of defendants.

[1] First names are used in this opinion for the sake of clarity.

[2] All further statutory references are to Code of Civil Procedure unless otherwise specified.

On appeal, Erich challenges the trial court's grant of summary adjudication of the second through fourth and seventh causes of action based on a statute of limitations defense. Those causes of action were for breach of contract (second cause of action), breach of the implied covenant of good faith and fair dealing (third cause of action), an accounting (fourth cause of action), and Labor Code violations (seventh cause of action).[3]

[3] The seventh cause of action alleged that Outfitter "failed and refused to pay [Erich] his wages in the form of 25% of [its] carry due [him] according to his agreement with Outfitter" and failed "to pay [Erich] the wages to which he [was] entitled," in violation of Labor Code Sections 201, 203, 204, 206 and 216. The Labor Code defines wages to include "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation." (Lab. Code, § 200, subd. (a).) "Incentive compensation, such as bonuses and profit-sharing plans, also constitute wages. [Citations.]" (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618 (*Schachter*).) Under Labor Code section 201, subdivision (a), "[i]f an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Labor Code section 203, subdivision (a), states in part that "[i]f an employer willfully fails to pay, without abatement or reduction, . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." Subdivision (b) of Labor Code section 203 provides that "[s]uit may be filed for these penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise." Labor Code Section 204, subdivision (a), generally provides that "[a]ll wages, other than those mentioned in [Labor Code] [s]ection 201 and [other enumerated sections], earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays." Subdivision (b)(1) of Labor Code section 204 states: "Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period." Labor Code section 206, subdivision (a), provides that "[i]n case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed." Labor Code section 216 makes it a misdemeanor for any person to "willfully refuse[] to pay wages due and payable after demand has been made" if there is an ability to pay or to "[f]alsely den[y] the amount or validity thereof, or that the same is due, with intent to secure for himself, his employer or other person, any discount upon such indebtedness, or

Those four causes of action were stated against only Outfitter. In granting summary adjudication, the trial court stated that "undisputed evidence show[ed] that [d]efendants breached the alleged oral agreement as early as April 2010 and as late as September 2010 causing [Erich] to suffer damages and requiring him to file suit within two years."

Erich's principal contention on appeal is that the trial court erred in determining that the two-year statute of limitations for oral contracts (§ 339, subd. 1) began to run in September 2010 at the latest. He argues that (1) the statute of limitations did not begin running as to the breach occasioned by Outfitter's failure to pay a 25 percent share of its carry to him until profits "in excess of $50 million" were first realized by the company "sometime in 2011 following the acquisition of one of its portfolio companies, FTEN, by The NASDAQ OMX Group, Inc." and (2) the doctrine of anticipatory breach did not apply to the carry agreement once it became unilateral, which he asserts occurred at least by the date of his termination in February 2010.[4] He also maintains that the trial court erred in granting summary adjudication of the four causes of action because there were many "fact disputes," including whether defendants unambiguously repudiated the carry agreement, when the breach of contract causes of action accrued, whether the employment agreement and the carry agreement were two separate contracts or a single

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with intent to annoy, harass, oppress, hinder, delay, or defraud, the person to whom such indebtedness is due."

[4] "In a unilateral contract, there is only one promisor, who is under an enforceable legal duty. (1 Corbin on Contracts (1993) § 1.23, p. 87.) The promise is given in consideration of the promisee's act or forbearance. As to the promisee, in general, any act or forbearance, including continuing to work in response to the unilateral promise, may constitute consideration for the promise. (1 Witkin, Summary of Cal. Law [(9th ed. 1987)] Contracts, § 213, p. 221; 2 Corbin on Contracts (1995) § 5.9, pp. 40-46; Rest.2d Contracts, §§ 71, 72; Civ.Code, § 1584.)" (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 10, fn. omitted (*Asmus*).) "An employment contract in which the employer promises to pay an employee a wage in return for the employee's work is typically described as a unilateral contract." (*Id*. at p. 10, fn. 4.)

contract, and whether defendants were equitably estopped from asserting a statute of limitations defense.

We will affirm the judgment.

Discussion

A. *Background*

The undisputed facts or uncontradicted evidence showed the following.

In 2000, Val and his then wife Lilli used their own money to start a venture capital fund, whose name was later changed to Outfitter. Val and Lilli had each contributed 50 percent of the initial capital to the company, and each of them had a 50 percent interest in the company. The operating agreement, dated March 13, 2000, stated that Val and Lilli were the company's members and Val was its initial manager. That operating agreement stated that "[u]nless expressly and duly authorized in writing to do so by a Manager, no Member as such shall have any power or authority to bind or act on behalf of the Company in any way, to pledge its credit, or to render it liable for any purpose." That operating agreement named Val as the company's initial president and Lilli as its initial secretary, and it stated that officers "serve[d] at the pleasure of the Manager." Val stated that he was still Outfitter's manager at the time of the motion for summary judgment or adjudication.

In about March of 2002, Erich began doing work for Outfitter as a consultant. In late 2003 or early 2004, Erich and Val "began discussions 'center[ing] on providing [Erich] with compensation in addition to his base salary in the form of a percentage of the "carry" that Outfitter would earn on its investments . . . .' " Erich earned a salary and received a W2 for 2004.

On or about June 18, 2004, in a brief conversation with Erich, Val mentioned Erich's getting 25 percent of the carry, vesting over five years.[5]

[5] Erich also submitted evidence of the following 2005 emails from Val. An email to Vicki Delegeane, dated January 26, 2005, stated in part: "Lastly, would you . . . ask

Erich's employment with Outfitter was terminated on February 26, 2010, effective immediately.

On April 13, 2010, Erich sent an email to Val "to schedule a meeting to discuss 'important items' including 'document[ing] [Erich's] 25% of the general partnership/carry,' '[s]ettl[ing] on an acceptable severance' and 'tax issues.' " In an April 18, 2010 email to Erich, Val indicated that Erich had been laid off for business reasons and that Outfitter was willing to pay Erich's COBRA premiums for six months and to make two lump sum payments, each equal to a month's salary. The email explained: "The first payment would come upon signing of a severance agreement, which contains important clauses regarding confidentiality, non-interference and mutual non-disparagement, among other items. The second payment would occur upon satisfactory completion of any transition work and documentation from you that contributes to an easier transition of relevant information, assets and documentation regarding projects on which you·have worked."

On April 19, 2010, Erich responded to Val's April 18 email by "demanding 'formal documentation of [his] share of the carry' " and further asserting that he had been " 'improperly classified as a consultant in the period from 2002-2003' and that '[they] need[ed] to figure out how to address that situation.' " In his April 19, 2010 email to Val "RE: Termination," Erich stated in part: "In March 2004, we agreed that I would get 25% of the carried interest in Outfitter Ventures—I asked repeatedly that we formally

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Leslie and Tim to work with the Outfitter Ventures docs to assign a 7.5% GP Interest to Erich (vesting over 5 years linearly, of course with full payout on any interim returns). This should be after return of all capital and recoupment of expenses. Then Erich probably needs to file that tax form that establishes his basis at zero . . . ." Another email to Vicki Delegeane, dated February 8, 2005, said in part, "in my conversation with Erich, I would like to award him 6% carry in Outfitter Ventures. I will go back to the 1ist of assets to let you know what I would like to include." In a deposition, Val acknowledged his communications with Vicki Delegeane of "MyCFO," and he confirmed that a 7.5 percent carry would equal 25 percent of a 30 percent carry.

document that deal. Now that Outfitters' interests are to be divided as a result of your divorce it is even more important to more formally document my interests in the company."

In an April 20, 2010 email to Erich "RE: Termination," Val stated, "Regarding the severance, the package offered was not intended to be negotiated. Outfitter is not under any obligation I am aware of, nor is it in a financial situation that enables more than what is being offered." Erich forwarded Val's email to Lilli and queried in his email to Lilli, "Am I going to have to sue?" In his deposition testimony, Erich acknowledged that as of April 20, 2010, he knew that Val's intention, acting on behalf of Outfitter, was not to pay him "any portion of Outfitter's profits or carry."

In September 2010, Erich and Val had a meeting. Erich acknowledged in a 2014 deposition that Val and he met in September 2010 and that, although the focus of the meeting was on severance, Erich specifically remembered raising his entitlement to a "share of the funds" and Val saying that he was completely unaware of any such kind of agreement and that he did not know what Erich was talking about. Erich indicated that in effect Val had said there was no carry agreement and there had been "a little back and forth" exchange in which Erich was saying, "[R]eally, . . . you're just denying that we ever had that." It was Erich's recollection that Val offered only a severance benefit of two payments over two months.

Val acknowledged in his deposition that Outfitter received "roughly $48 million" "[o]n a pretax basis" "sometime after December 15, 2010" from the sale of FTEN.

On December 10, 2012, Erich filed this lawsuit against defendants.

B. *Standard of Review*

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (§ 437c, subd. (a)(1).) "Summary judgment is appropriate only 'where no triable issue of material fact exists and the moving party is entitled to judgment as a

matter of law.' (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)" (*Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618 (*Regents*); see § 437c, subd. (c).) "[S]ummary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (§ 437c, subd. (c).)

"A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (§ 437c, subd. (f)(2).) "A party may move for summary adjudication as to one or more causes of action within an action . . . , if the party contends that the cause of action has no merit . . . ." (§ 437c, subd. (f)(1).)

In moving for summary judgment or adjudication, "[a] defendant . . . has met [the] burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2).) If the defendant meets that burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (*Ibid*.) The plaintiff cannot "rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists" (*ibid*.) but instead must "set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (*Ibid*.)

"On review of an order granting or denying summary judgment, we examine the facts presented to the trial court and determine their effect as a matter of law." (*Parsons v. Crown Disposal Co*. (1997) 15 Cal.4th 456, 464 (*Parsons*).) "We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]" (*Merrill v. Navegar, Inc., supra,* 26 Cal.4th at p. 476 (*Merrill*).) "Evidence presented in opposition to summary judgment is liberally construed, with any doubts about the evidence resolved in favor of

the party opposing the motion. (*Yanowitz v. L'Oreal USA, Inc*. (2005) 36 Cal.4th 1028, 1037.)" (*Regents, supra*, 4 Cal.5th at p. 618.) As with a ruling on a motion for summary judgment, "[a] ruling on a motion for summary adjudication is reviewed de novo. [Citation.]" (*Jacks v. City of Santa Barbara* (2017) 3 Cal.5th 248, 273.)

"To determine whether triable issues of fact do exist, we independently review the record that was before the trial court when it ruled on defendants' motion. [Citations.]" (*Martinez v. Combs* (2010) 49 Cal.4th 35, 68.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) "The materiality of a disputed fact is measured by the pleadings [citations], which 'set the boundaries of the issues to be resolved at summary judgment.' [Citations.]" (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250 (*Conroy*).)

C. *Analysis*

1. *Accrual of Cause of Action*

"The limitations period, the period in which a plaintiff must bring suit or be barred, runs from the moment a claim accrues. [Citations.]" (*Aryeh v. Canon Business Soulutions, Inc*. (2013) 55 Cal.4th 1185, 1191; see § 312; see *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 397 (*Norgart*).) "While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. [Citation.]" (*Jolly v. Eli Lilly & Co*. (1988) 44 Cal.3d 1103, 1112 (*Jolly*).) As indicated, a two-year statute of limitations applies to oral contracts. (§ 339, subd. 1.)

2. *Breach by Failure to Pay for Accrued, Unused Vacation*

In responding to the argument that the statute of limitations began to run upon repudiation following a partial breach of contract, Erich contends that, aside from the

asserted obligation to pay 25 percent of its carry to him, "there [was] no factual basis whatsoever . . . for finding that [Outfitter] breached an obligation to pay benefits to [him] or reimburse [him]." Defendants argue that Erich claimed in discovery that he was owed for accrued vacation time and any failure to pay for accrued vacation at the time of his termination in February 2010 was at least a partial breach of the oral employment agreement between Outfitter and Erich.

In response to special interrogatories, Erich had stated that defendants owed him "$33,807.69 . . . for unpaid accrued vacation time, per the agreement he had with [them] that he would get the same pay deal he had gotten at his previous job at Generation Partners, which included four weeks' vacation per year." In his special interrogatories responses, Erich also had claimed that he was owed for unreimbursed expenses, totaling almost $34,000,[6] and $34,339.72 for "payroll taxes plus IRS penalties and interest associated with nonpayment of the taxes[] for work he performed in 2002 and 2003 as an independent contractor consultant when he was clearly working as an employee of Outfitter." In his deposition, Erich had acknowledged that he was claiming that Outfitter owed him for 2002 and 2003 payroll taxes and unreimbursed expenses.

Erich's discovery responses indicated that he was asserting that Outfitter had breached the oral employment agreement by failing to pay for vested vacation time that had accrued under that agreement. In his declaration in opposition to summary judgment, Erich also stated that he "was terminated without having taken off [his] vested vacation time at Outfitter" and "Outfitter ha[d] yet to pay [him] for [his] unused vested vacation time." Even if he was not seeking to recover from Outfitter damages for accrued vacation time as he now claims, there was a contractual breach under the uncontradicted

[6] Labor Code section 2802, subdivision (a), generally requires an employer to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."

facts presented on the motion that was relevant to the running of the statute of limitations.[7]

3. *Repudiation*

Erich now asserts that a triable issue of material fact existed as to whether the alleged carry agreement to share profits was unambiguously repudiated.

Repudiation of a contract may be express or implied. (*Taylor v. Johnston* (1975) 15 Cal.3d 130, 137.) "An express repudiation is a clear, positive, unequivocal refusal to perform [citations]; an implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible [citations]." (*Ibid*.)

It is true that "repudiation is ordinarily a question of fact and intent, and [whether a contract has been repudiated] must be determined by the facts in the particular case. [Citation.]" (*Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 28 (*Gold Mining*).) But even if an issue is "normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. [Citation.]" (*Jolly*, *supra*, 44 Cal.3d at p. 1112.)

Uncontradicted evidence showed that after his termination in February 2010, Erich repeatedly asked for documentation of an alleged agreement entitling him to 25 percent of Outfitter's carry. That evidence included the series of emails exchanged in April 2010. In his April 20, 2010 email to Erich, Val stated that Outfitter was "not under any obligation I am aware of."

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[7] The Labor Code does not mandate that employers grant paid vacation, but it provides that "an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." (Lab. Code, § 227.3.) It establishes the general rule that "whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages . . . ." (*Ibid*.) An action for breach of contract predicated on unpaid, vested vacation time accrues when an employee is terminated. (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1583.)

At a deposition in 2014, Erich was asked, "So as of April 20, 2010, you knew that Val on behalf of Outfitter was not going to pay you any portion of Outfitter's profits or carry, right?" Erich replied, "I knew at this date that was his intention." Erich also acknowledged in his deposition that based on the April 20, 2010 email from Val, he "clearly saw" that "Val [was] saying no, I'm not going to pay you that."

At his deposition, Erich recalled asking Val "about [his] share of the funds" at the September 2010 meeting and Val's response that Val "was completely unaware of any kind of agreement that [they] had" and did not "even know what [Erich was] talking about." Erich agreed that in essence Val had been saying that there was "no such agreement."

In his declaration in opposition to summary judgment or adjudication, Erich claimed that "Val and Outfitter never expressly and unequivocally repudiated their promise to pay [him] a percentage of Outfitter's profits" and that he "never understood them to have committed a full repudiation of their obligation to compensate [him for his] share of the profits." Erich also stated in his declaration that during the September 2010 meeting, he "again asked that . . . [his] share of the carry be documented" and that "[a]t no point did Val clearly and unequivocally repudiate the agreement and say he would never pay my share of profits."

"[A] party cannot create an issue of fact by a declaration [that] contradicts his prior discovery responses. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860; see also *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.)" (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12.) Erich's conclusory statements in his declaration were insufficient to raise a triable issue of material fact as to repudiation. They directly contradicted Erich's prior deposition statements, which indicated that Val had made clear at their September 2010 meeting, and Erich had understood, that Outfitter was not going to recognize or perform any carry agreement.

4. *Breach Followed by Repudiation Gives Rise to Action for Total Breach*

In the case of *Gold Mining*, the Supreme Court differentiated a true anticipatory breach of contract from a partial breach of contract accompanied or followed by repudiation of the contract. The court explained: "Strictly speaking, a total breach of a contract may arise in two ways, which although different, have been frequently confused with each other. One is an anticipatory breach, or as it may be termed, a breach by anticipatory repudiation, which is necessarily total and which is of importance both with relation to an excuse for nonperformance by the promisee, the repudiation being by the promisor, and the right of the promisee to recover damages immediately for a total breach of the contract before performance by the promisor is due thereunder. By its very name an essential element of a true anticipatory breach of a contract is that the repudiation by the promisor occur before his performance is due under the contract." (*Gold Mining*, *supra*, 23 Cal.2d at p. 29.) Thus, "[a] contract is totally breached and an anticipatory repudiation occurs when the promisor without justification and before he has committed a breach, makes a positive statement to the promisee indicating that he will not or cannot substantially perform his contractual duties. [Citations.]" (*Ibid*.)

The Supreme Court further explained in *Gold Mining* that in addition to total breach accomplished by anticipatory repudiation, there also "may be a total breach of a contract where there has been a partial breach by the promisor, which means of course that the time for a portion of the performance was due" (*Gold Mining*, *supra*, 23 Cal.2d at p. 29), and the promisor's partial breach is "accompanied or followed by a repudiation of the contract by the promisor." (*Ibid*.) In that case, the court found that there had been a partial breach by lessees followed by repudiation of a mining lease, making the breach total. (*Id*. at pp. 26, 29.) Consequently, the plaintiff lessor "could recover all past and prospective damages suffered, in an action which it could bring immediately after the repudiation." (*Id*. at p. 29.)

The subsequent case of *Coughlin v. Blair* (1953) 41 Cal.2d 587 (*Coughlin*), the California Supreme Court explained that "[i]n an action for damages for [a total breach of contract], the plaintiff in that one action recovers all his damages, past and prospective. [Citations.]" (*Id*. at p. 598.) It stated: "If the breach [of contract] is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. [Citations.] Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. (*Fresno Canal & Irr. Co. v. Perrin* [(1915)] 170 Cal. 411, 415; Rest., Contracts, § 317(2).)"[8] (*Id*. at pp. 598-599.)

In *Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479 (*Romano*), the California Supreme Court considered the doctrine of anticipatory breach. It stated: "A cause of action for breach of contract does not accrue before the time of breach. [Citations.] . . . 'There can be no *actual* breach of a contract until the time specified

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[8] The Restatement of Contracts (1932) , section 317, subsection (2), pages 471-472, indicated that where there had been a total breach by a material failure to perform or by non-performance accompanied or followed by repudiation, "the injured party may by continuance or assenting to continuance of performance, or by otherwise manifesting an intention so to do, treat the breach as partial, *except that where there has been one of the acts of repudiation* . . . , whether anticipatory or not *subsequent assent of the wrongdoer to the continuance of the contract is requisite* in order to permit this result." (Italics added.) Comment b to section 317, page 472, stated that "in all contracts of the classes enumerated in § 318 ["Anticipatory Repudiation as a Total Breach"], a breach by non-performance . . . that would otherwise be partial, becomes a total breach if accompanied or followed by any act of repudiation that would have constituted a total breach had it occurred before any other failure to perform a contractual duty, though here also if there has been no change of position the effect of the repudiation can be nullified, in which case the breach will be only partial." The Restatement Second of Contracts, section 243, comment b, explains that under the rule that breach by non-performance accompanied or followed by repudiation gives rise to a claim for damages for total breach, "the injured party can assert a claim for damages for a partial breach without prejudice to a claim for damages arising out of a subsequent breach *if he and the repudiator agree* that the latter's performance under the contract is to be continued." (Italics added.)

therein for performance has arrived.' [Citation.] Nonetheless, if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred. [Citations.] The rationale for this rule is that the promisor has engaged not only to perform under the contract, but also not to repudiate his or her promise. (4 Corbin, Contracts (1951 ed.) § 959, p. 852.)" (*Id*. at pp. 488-489.)

Romano was a wrongful termination case (*Romano, supra,* 14 Cal.4th at p. 483), and "Rockwell argued [the statutes of limitations] began to run on December 6, 1988, when it notified Romano his employment would be terminated" (*id*. p. 486) "when he reached 85 points [under the company's retirement plan], which would occur May 31, 1991." (*Id*. at p. 484.) "Romano maintained, in contrast, that the statutes of limitations began to run on May 31, 1991, when his employment actually terminated." (*Id*. at p. 486.)

In *Romano,* the Supreme Court explained: "In the event the promisor repudiates the contract before the time for his or her performance has arrived, the plaintiff has an election of remedies—he or she may 'treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.' [Citations.]" (*Romano, supra,* 14 Cal.4th at p. 489.) The court observed that "whether the breach is anticipatory or not, when there are ongoing contractual obligations the plaintiff may elect to rely on the contract despite a breach, and the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract. [Citation.]" (*Id*. at p. 489.) Thus, even if there was a breach of contract by anticipatory repudiation, "Romano could elect not to bring suit immediately, but instead await actual termination." (*Id*. at p. 491.) The court concluded that "the statute of limitations applicable to the

contract claims began to run at the time Romano's employment actually was terminated, and that the causes of action for breach of contract were timely filed." (*Ibid*.)

Erich makes no claim in this lawsuit that he was wrongfully terminated.[9] Neither is Erich arguing that a contractual obligation to pay his share of the carry was breached by anticipatory repudiation but that he elected to wait until the time of actual breach to sue. Rather, he is arguing that the carry agreement had become unilateral and it is the rule that unilateral contracts are not subject to the law of anticipatory breach. He maintains that, under that rule, the action for breach did not accrue until payment of his share of Outfitter's carry was due. We will separately address his argument regarding unilateral contracts after considering the general rule that a breach accompanied or followed by repudiation gives rise to a cause of action for total breach.

In this case, the uncontradicted facts showed that Outfitter failed to pay for any accrued vacation upon Erich's termination and subsequently repudiated any obligation to pay a share of Outfitter's carry, allegedly a part of his compensation. Repeatedly citing *Gutride Safier LLP v. Reese* (N.D. Cal. Aug. 9, 2013) 2013 U.S. Dist. LEXIS 112747 (*Gutride Safier*), an unreported federal district case,[10] defendants urge us to conclude that statute of limitations had run on Erich's breach of contract claims because breach followed by repudiation gave rise to a claim for damages for total breach.[11]

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[9] "Labor Code section 2922 provides that '[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other.' An at-will employment may be ended by either party 'at any time without cause,' for any or no reason, and subject to no procedure except the statutory requirement of notice. [Citations.]" (*Guz v. Bechtel National Inc*. (2000) 24 Cal.4th 317, 335, fn. omitted.)

[10] Citation of unpublished federal opinions does not violate California's Rules of Court. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1096, fn. 18; see Cal. Rules of Court, rule 8.1115.) "Although not binding precedent on our court, we may consider relevant, unpublished federal district court opinions as persuasive. [Citation.]" (*Futrell v. Payday California, Inc*. (2010) 190 Cal.App.4th 1419, 1432, fn. 6.)

[11] In *Gutride Safier*, a law firm sued a former partner and his new law firm, alleging that he had failed to comply with the terms of an agreement governing withdrawal from Gutride Safier. (*Gutride Safier*, *supra*, 2013 U.S. Dist. LEXIS 112747

Here, there was no mutual agreement between Outfitter and Erich subsequent to repudiation of any obligation to pay Erich a 25 percent share of Outfitter's carry that Outfitter would perform. (See *ante*, fn. 8.) We conclude that under the general rule establishing that a breach accompanied or followed by repudiation gives rise to a cause of action for total breach, a cause of action for breach of contract accrued, and the statute of limitations began to run, in September 2010 at the latest. (See *Gold Mining*, *supra*, 23 Cal.2d at p. 29; Rest.2d Contracts, §§ 243 & com. b, 250, com. a, pp. 250-253, 272-273.) Under that rule, the two-year statute of limitations (§ 339, subd. 1) had expired by the time the complaint was filed in December 2012.

Further, even if Erich's employment agreement was unilateral in April and September 2010, we reject Erich's assertion that a cause of action for damages for total breach did not accrue in September 2010. We turn to that issue now.

5. *Breach of Unilateral Contracts*

Erich argues that "the doctrine of partial breach plus anticipatory repudiation applies only to bilateral contracts, not unilateral contracts." Erich maintains that his "carry" contract had become "a unilateral one" upon his termination in February 2010, at the latest. He states that "when [he] was terminated by Outfitter in February 2010, he had necessarily performed all work and fulfilled all of his obligations to [defendants]."

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*1.) "In his counterclaim for breach of contract, [the former partner] allege[d] that . . . the partnership agreement and its addendum [had been breached] by 'forcing [him] out of the Firm and paying [him] a lessor [*sic*] amount than was due him pursuant to the terms . . . .' " (*Id*. at *10.) The former partner claimed that he had not been fully paid his share for two cases that had settled in February 2008 and for cases that had settled in 2010. (*Ibid*.) At a meeting in February 2008, Gutride and Safier had repudiated the partnership agreement/addendum (*id*. at pp. *22-23) and the former partner had signed a withdrawal agreement (allegedly under duress) (*id*. at pp. *4-5), but the former partner had not filed his counterclaim until March 2013. (*Id*. at p. *11.) The district court agreed that the former partner's counterclaim for breach of contract was time barred under California's four-year statute of limitations applicable to written contracts because the partial breach in February 2008 was accompanied or followed by a repudiation. (*Id*. at pp. *27-28.)

Defendants contend that the cases relied upon by Erich are inapt because they primarily arose from breaches of installment contracts. Erich disputes that the unilateral contract exception is limited to installment contracts. He claims the statute of limitations for breach of the carry agreement did *not* begin to run until Outfitter's performance was due, i.e. when it received a profit.

In *Cobb v. Pacific Mutual Life Ins. Co*. (1935) 4 Cal.2d 565 (*Cobb*), the California Supreme Court recognized the general unilateral contract rule: "There can be no anticipatory breach of a unilateral contract. (Williston on Contracts, vol. III, sec. 1328.) In volume 1, Restatement of Contracts, California Annotations, section 318, the rule is thus stated: 'In unilateral contracts for payment in instalments after default of one or more no repudiation can amount to an anticipatory breach of the rest of the instalments not yet due.' (Citing a list of California decisions.) It is also the law that a bilateral contract becomes unilateral when the promisee has fully performed." (*Id*. at p. 573.)

In *Cobb*, the issue was "whether the doctrine of anticipatory breach [was] applicable to a policy of insurance which provide[d] for payment of instalments of indemnity for disabilities" (*Cobb, supra*, 4 Cal.2d at p. 570) since the insurer had repudiated it. The California Supreme Court determined that the doctrine did not apply, stating, "[t]he principle upon which the right to declare a contract at an end without a provision to do so and to sue for a breach of such a contract differs so fundamentally and widely from a contract of indemnity to pay a definite fixed sum in money during health disability that the doctrine of anticipatory breach would seem to be an inept and in many cases an unjust doctrine . . . ." (*Id*. at p. 573.) It explained: "The action is based upon contract for the payment of money, not unlike a promissory note providing for instalments or the payment of rent. The instalments as they become due are but debts." (*Ibid*.)

Restatement of Contracts, section 316, page 470, stated the unilateral contract rule: "Where a unilateral contract, or a bilateral contract that has been wholly performed on

one side, is for the payment of money in instalments or for the performance of other acts, not connected with one another by a condition having reference to more than one of them or otherwise, a breach as to any number less than the whole of such instalments or acts is partial." Comment e to section 318 of Restatement of Contracts, page 477, made clear that a breach in such cases could not "arise before the time fixed in the contract for some performance."

In a case predating the Restatement Second of Contracts, the Ninth Circuit summarized California contract law regarding total breach: "Under the California cases, as we read them, the controlling rule is as follows: A breach of contract which, by itself, would be considered partial may be total if it is accompanied by unequivocal repudiation of the whole contract (*Gold Min. & Water Co. v. Swinerton*, 23 Cal.2d 19 (1943); Restatement of Contracts, § 317 (1932); 5 Williston on Contracts, § 1329 (1937)), provided, however, that if the contract is a unilateral contract 'for future payments of money only' (*John Hancock Mutual Life Ins. Co. v. Cohen*, 254 F.2d 417 (9th Cir. (1958)), or 'for the performance of other acts not connected with one another' (Restatement of Contracts, § 316 (1932)), then such a breach can only be partial, even if it is accompanied by unequivocal repudiation of the whole contract. Compare *Coughlin v. Blair*, 41 Cal.2d 587, 599 (1953) and *Gold Min. & Wat. Co. v. Swinerton*, *supra*, with *Cobb v. Pacific Mutual Life Ins. Co.*, 4 Cal.2d 565 (1935); *Flinn & Treacy v. Mowry*, 131 Cal. 481 (1901); *John Hancock Mutual Life Ins. Co. v. Cohen*, *supra*; *Minor v. Minor*, 184 Cal.App.2d 118 (1960)."[12] (*Riess v. Murchison* (9th Cir. 1964) 329 F.2d 635, 640.)

[12] In *John Hancock Mutual Life Ins. Co.*, the Court of Appeals, Ninth Circuit, was "asked to hold that the doctrine of anticipatory breach applies to an unconditional unilateral insurance contract in a case where the insurer has promised to pay definite sums of money at specified future dates . . . ." (*John Hancock Mutual Life Ins. Co., supra*, 254 F.2d at p. 425.) It concluded that "the general rule [was] that the doctrine of anticipatory breach has no application to suits to enforce contracts for future payment money only, in installments or otherwise. [Citations.]" (*Id.* at p. 426.)

The cases cited by Erich generally fit within the general unilateral contract rule. *Harris v. Time, Inc*. (1987) 191 Cal.App.3d 449 (*Harris*) involved an advertising mailer that seemingly indicated from the outside that the recipient would be entitled to a calculator watch if he or she opened the mailer. The appellate court concluded in dictum that "Time's unopened mailer was, technically, an offer to enter into a unilateral contract: the promisor made a promise to do something (give the recipient a calculator watch) in exchange for the performance of an act by the promisee (opening the envelope)." (*Id*. at p. 455.) Once opened, the mailer's contents made clear that the recipient had to "purchase a subscription to Fortune magazine in order to receive the free calculator watch." (*Id*. at p. 453.) Citing *Cobb*, the appellate court indicated that it was bound by the general rule that "there can be no anticipatory breach of a unilateral contract. (*Auto Equity Sales, Inc. v. Superior Court* [(1962)] 57 Cal.2d [450,] 455.)" (*Harris, supra*, at p. 458.) The court recognized that the unilateral contract rule had been criticized by a treatise.[13] (*Id*. at pp. 457-458.)

In any case, *Harris* was not resolved based on the unilateral contract rule, and its remarks regarding that rule were merely dicta. It determined the lawsuit to be "an absurd

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[13] Corbin on Contracts, a well-respected treatise, presently states: "It has been frequently stated and generally held that repudiation before the time fixed for performance of a contract can never operate as an anticipatory breach thereof if the contract was unilateral at the time of the repudiation. Such statements are based upon the erroneous idea that the reason for holding an anticipatory repudiation to be a breach of contract is that otherwise the injured party must himself continue to be ready to perform on his own part. It would follow from this that, if the injured party never had any performance to render on his part, or, having such a performance, has already fully performed it, it would not be necessary for his protection to give him an immediate action for damages for the anticipatory breach. [¶] Allowing an action for an anticipatory breach cannot properly be rested upon this 'readiness' rationale. . . [E]xecutory contract rights have value. Their value may be significantly diminished by the obligor's repudiation. Such rights may be assigned and they may inspire justifiable reliance. The reasons upon which an action for anticipatory breach can actually be sustained are equally applicable to unilateral contracts." (10 Corbin on Contracts (2018) § 54.4, fns. omitted.)

waste of [its] resources" (*Harris, supra,* 191 Cal.App.3d at p. 458) and " 'de minimis' in the extreme." (*Ibid.*) It affirmed the judgment because it was "correct based on the 'de minimis' theory." (*Id.* at p. 460.)

Diamond v. University of So. California (1970) 11 Cal.App.3d 49 (*Diamond*), another case cited by Erich, was a class action whose members had purchased, for the first time, economy tickets for a football season after the University of Southern California promised that "each buyer of such a ticket would be given an option to purchase a Rose Bowl ticket, if the team were to be selected to play there." (*Id.* at p. 51.) "After the team's selection for the Rose Bowl game, on or about December 4, 1968, instead of the promised application for a Rose Bowl ticket, plaintiff received a note to the effect that for reasons beyond defendant's control, first-time economy season ticket holders could not be furnished with such applications." (*Ibid.*) Ultimately, "a sufficient number of [other types of] season ticket holders had not availed themselves of their option so that it became possible to send applications for tickets to those who had previously received none, this is to say, the first time [*sic*] economy ticket holders." (*Id.* at p. 52.) The trial court granted the defendant university's motion for summary judgment, and the class representative appealed from the judgment "to vindicate [his] right to attorney's fees." (*Ibid.*, fn. omitted.)

The appellate court in *Diamond* determined that the action was premature when filed because, by the time the university initially repudiated the contract with the economy season ticket holder, it had become unilateral. (*Diamond, supra,* 11 Cal.App.3d at p. 54.) "Plaintiff and the members of his class had done all that they had ever been obligated to do, that is to pay the price of a season ticket. Nothing was left but for defendant to furnish the applications for the Rose Bowl tickets." (*Ibid.*) The court said it was applying "the general rule, recognized in this state, that the doctrine of breach by anticipatory repudiation does not apply to contracts which are unilateral in their inception or have become so by complete performance by one party. [Citations.]" (*Id.* at p. 53.)

The court recognized that it was employing "a technical exception to the doctrine of anticipatory breach" (*id*. at p. 55) and that the unilateral contract exception had been criticized by Professor Corbin (*id*. at p. 54, fn., 4). Arguably, the promisor in *Diamond* promised to do two unconnected acts, i.e. provide season football tickets and an application for Rose Bowl tickets.

In *Maudlin v. Pacific Decision Sciences Corp*. (2006) 137 Cal.App.4th 1001 (*Maudlin*), a case also relied upon by Erich, the plaintiff, who had retired from his full-time employment with a company, negotiated a deal with his long-time business partner to "pay him $2.9 million over a period of nearly 23 years" (*id*. at p. 1004). "The monies were paid as agreed for nearly five and one-half years." (*Ibid*.) After the company merged with a wholly owned subsidiary, the payments stopped, and the plaintiff filed suit. (*Id*. at pp. 1006-1007.) The appellate court determined that, "[a]ssuming the transaction was a stock repurchase, as found by the trial court, we conclude the transaction was *not* illegal under California's corporate law." (*Id*. at p. 1008.)

Although the *Maudlin* case was remanded for further proceedings (*Maudlin, supra,* 137 Cal.App.4th at p. 1019), the appellate court also observed, impliedly for remand purposes, that a judgment could be "entered only for the accrued, unpaid installments . . . [but] not for the present value of the future income stream." (*Id*. at p. 1018.) The court explained: "Maudlin's theory of anticipatory breach of contract argued at the first trial is inapplicable to the installment obligation created by this stock redemption agreement. It is well established in California law that, in the absence of an acceleration clause, a contract made unilateral by one party's complete performance renders the doctrine of anticipatory breach inapt. [Citations.]" (*Ibid*.)

Minor v. Minor, supra, 184 Cal.App.2d 118 (*Minor*) was cited in *Maudlin*, *Harris*, and *Diamond*. (See *Maudlin, supra,* 137 Cal.App.4th at p. 1018; *Harris, supra,* 191 Cal.App.3d at p. 457; *Diamond, supra,* 11 Cal.App.3d at pp. 53-54.) *Minor* involved a divorce settlement agreement, which did not contain an acceleration clause triggered by

default. (*Minor, supra*, at p. 120.) The agreement provided that the former husband would pay the former wife a total of $10,000 through an initial payment and then fixed monthly installments, in consideration for which the wife waived any future claim to alimony. (*Ibid*.) The appellate court held that total recovery for breach of the agreement was "foreclosed by the embedded rule that the doctrine of anticipatory breach does not apply to an installment contract which has been fully performed by the adverse party." (*Id*. at pp. 127-128.) It explained that the payments, which were "due upon the fixed dates," were "separable and divisible." (*Id*. at p. 125.) It explained: "The default in one, even though concomitant with a renunciation of the whole contract, does not preclude performance of the remainder. The series of acts are not so connected that the omission of one affects the totality; the purpose of the covenant may be achieved even though a single payment may fail." (*Ibid*.)

But the rule generally applicable to unilateral contracts is not a mechanical one that invariably governs all unilateral contracts. Comment a to section 316 of Restatement of Contracts, page 470, explained: "Acts promised in a unilateral contract may be connected with one another because of close relation in time or because of the *comparative importance of having all the acts performed in order to achieve the object of the contract*. Even though the acts are separated in time, they may be so connected in some other respect that a breach of one or more of them may involve the destruction or material injury of the main purpose of the contract."[14] (Italics added.)

The Restatement Second of Contracts, section 243, subdivision (3), page 250, now provides that "[w]here at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not

[14] Comment b to Restatement of Contracts, section 317, pages 472-473, mentioned that "in certain unilateral contracts that cannot be broken by anticipatory repudiation, a breach by non-performance or prevention is total although except for the repudiation the breach would have been partial."

related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach."[15] But subdivision (2) of that section continues that general rule applicable to other contracts that "[e]xcept as stated in [subdivision] (3), a breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach." (Rest.2d Contracts, § 243, subd. (2), p. 250.) Comment c to that section explains: "It is well established that if those duties of the party in breach at the time of the breach are simply to pay money in installments, *not related to one another* in some way, as by the requirement of the occurrence of a condition with respect to more than one of them, then a breach as to any number less than the whole of such installments gives rise to a claim merely for damages for partial breach. Whether there is a relationship between installments or other acts depends on the extent to which, in the circumstances, a breach as to less than the whole of such installments or acts can *substantially affect the injured party's expectation under the contract*." (Rest.2d Contracts, § 243, com. c, p. 254, italics added.)

In the *Gold Mining* case previously discussed, the lessor (Gold Mining & Water Company) brought a damages action for breach of a mining lease against the lessees. The lessees had committed a partial breach of the lease and then repudiated the lease by refusing "to have anything further to do with the lease or property unless [the company] consented to [an] assignment" of the lease. (*Gold Mining*, *supra*, 23 Cal.2d at pp. 26-28.) On appeal, the "defendants urge[d] that the doctrine of anticipatory breach [could not] be

[15] Corbin on Contracts observes that "the Restatement (Second) of Contracts has abandoned the terms 'unilateral' and 'bilateral,' without, however, abandoning the concepts behind them." (1 Corbin on Contracts (2018) § 1.23, fn. omitted; see Rest. 2d Contracts, Reporter's Note foll. § 1, p. 8.) We note that Restatement Second of Contracts, section 243 does not expressly refer to "acts not connected with one another" (Rest., Contracts, § 316, p. 470).

applied to a lease" (*Id*. at p. 30) and that the lessor was required to "wait for each installment to fall due before he has a cause of action for a breach of the lease."[16] (*Ibid*.)

The Supreme Court reasoned in *Gold Mining*: "Even if it be assumed in the instant case that the lease was a bilateral contract which had become unilateral by the full performance thereof by the plaintiff-lessor-promisee when it demised the premises to the lessees, and that therefore, under the general rule a partial breach coupled with a repudiation would not constitute a total breach entitling plaintiff to bring an action for prospective damages, the result is the same because that rule [as to unilateral contracts] does not apply where the acts to be performed by the promisor are connected with one another such as under the circumstances of this case. Where the acts to be performed by the promisor are connected, and the thing to be accomplished by the contract is an entirety, the breach may be total where there is a partial breach coupled with repudiation even though the promisee has fully performed the bilateral contract. Restatement, Contracts, sec. 316. In the case at bar the obligations of defendants, lessees, were indivisible and not separable. They were to continuously mine the property as rapidly as due diligence required and extract the minerals therefrom. Clearly, the lease contemplated the continuous extraction of minerals by lessees as one entire obligation. The mere fact that the royalties were payable monthly and that 300,000 cubic yards were to be worked annually carries no implication that each payment of royalties was severable from the other, or that each year's output of 300,000 cubic yards was severable from every other year. Rather the one was merely a specification of the time for paying whatever the royalties there might be and the other a minimum below which the output

[16] Under prior law, the doctrine of breach by anticipatory repudiation was inapplicable to an ordinary lease, but mining leases were considered to be "in a class by themselves." (*Gold Mining, supra*, 23 Cal.2d at pp. 30-32; see 12 Witkin, Summary of Cal. Law (11th ed. 2017) Real Property, § 721, p. 817; see also Civ. Code, § 1951.2.)

should not fall. It is not like the case of money payable in fixed installments." (*Gold Mining*, *supra*, 23 Cal.2d at pp. 29-30.)

Citing *Gold Mining*, the Supreme Court stated in *Coughlin* that if "the injured party has fully performed his obligations under a bilateral contract, courts usually treat a breach as partial unless it appears that performance of the agreement is unlikely and that the injured party may be protected only by recovery of damages for the value of the promise. (*Gold Min. & Water Co. v. Swinerton*, 23 Cal.2d 19, 29-30; Rest., Contracts, § 316.)" (*Coughlin*, *supra*, 41 Cal.2d at p. 599.) *Fox v. Dehn* (1974) 42 Cal.App.3d 165 (*Fox*), an employment case, relied upon the *Gold Mining* case to find that the employer's breach followed by repudiation gave rise to a cause of action for total breach, which was time-barred.

In *Fox*, William Dehn had been "doing business as a sole proprietor under the name of William Dehn and Associates," and he had employed the two plaintiffs, both licensed real estate salesmen, pursuant to an oral contract. (*Fox*, *supra*, 42 Cal.App.3d at p. 168.) Dehn died on June 1, 1970, allegedly without paying the plaintiffs what they were owed. (*Id*. at pp. 168-169.) The sole proprietorship "ceased with [Dehn's] death." (*Id*. at p. 169.) It was undisputed that "on February 22, 1970, decedent [had] breached the agreement by failing and/or refusing to reimburse the alleged out-of-pocket expenses amounting to $2,000; failing and/or refusing to pay commissions prospectively owed to appellants under the oral agreement; failing and/or refusing to enter into a written agreement with appellants; and by informing appellants that he would not honor the oral employment contract or carry out its terms." (*Id*. at pp. 168-169.) The plaintiff's damages action for breach of contract was filed more than five months after the executrix of Dehn's estate had rejected their claim. (*Id*. at p. 168.) The trial court granted summary judgment based on a three-month statute of limitations, which began to run when the executrix rejected their claim. (*Id*. at pp. 168-169 & fn. 2.)

On appeal in *Fox*, the plaintiffs did not explicitly assert that their employment contract was or had become unilateral, but they argued in part that "their agreement with decedent [was] severable and as such the statute of limitations only began to run at the time of breach as to each obligation." (*Fox, supra*, 42 Cal.App.3d at p. 172, fn. omitted.) The appellate court rejected the argument, stating: "[*Gold Mining, supra*, 23 Cal.2d at p. 30] answers this contention. There, the court stated that '[w]here the acts to be performed by the promisor are connected, and the thing to be accomplished by the contract is an entirety, the breach may be total where there is a partial breach coupled with repudiation . . .' Where the acts required are indivisible, continuous, and not separable, the breach is total. (*Ibid*.)" (*Id*. at p. 172.) It indicated that the oral employment contract at issue in that case was not like a case involving money payable in fixed installments. (*Id*. at p. 173.) The court stated that "[d]ecedent's breach has been correctly characterized by respondents: a partial breach followed by a repudiation which made the breach total on February 22, 1970, at which time a cause of action for damages immediately arose." (*Id*. at p. 172.)

Here, any promise by Outfitter to pay Erich a 25 percent share of its carry as an incident of his employment once Erich had worked five more years was not an obligation to pay money in unrelated installments or to perform unconnected acts. Rather, any such obligation was part of a comprehensive compensation package. Even if Erich's employment contract was or had become a unilateral contract, it was either outside the scope of the general unilateral contract rule or within an exception to that rule. (See *Gold Mining*, *supra*, 23 Cal.2d at p. 30; Rest.2d Contracts, § 243 & coms. b, c, pp. 252-254; Rest., Contracts, § 316 & com. a, p. 470.) In this case "the thing to be accomplished by the contract [Erich's employment] [was] an entirety." (*Gold Mining*, *supra*, at p. 30.) The acts promised, payment of the various components of compensation, were "connected with one another" (*ibid*.). Outfitter's breach of the obligation to pay wages by not paying for any accrued vacation time followed by repudiation of any obligation to

pay 25 percent of its carry to Erich substantially affected Erich's "expectation under the contract." (Rest.2d Contracts, § 243, com. c, p. 254.) Consequently, the result in this case was the same as in the case of breach of a bilateral contract accompanied or followed by repudiation—that is a claim for damages for total breach arose upon repudiation following breach (as in *Gold Mining*). (See *Gold Mining, supra*, at pp. 29-30.) Thus, a cause of action for damages for total breach arose no later than September 2010. The two-year statute of limitations applicable to oral contracts (§ 339, subd. 1) had run by the time that Erich filed his complaint on December 10, 2012.[17]

6. *No Triable Issue Whether Employment Agreement was "Single Contract"*

Erich argues that (1) Outfitter's failure to pay him for his unused, accrued vacation was a breach of his employment agreement but not a breach of the carry agreement, which was separate, and (2) defendants "offered . . . no evidence that the two agreements were in fact part of a single, integrated contract, such that a failure to pay [him] certain benefits or reimburse him post-termination was a partial breach of the contract that entitled [him] to up to 25% of Outfitter's carry." Erich asserts that even if the trial court correctly found that Outfitter had breached Erich's employment contract, "a fact dispute"

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[17] In his reply brief, Erich states that he is abandoning his seventh cause of action except as to Outfitter's failure to pay him 25 percent of its carry, and he suggests for the first time on appeal that a three-year statute of limitations applies to that cause of action. (See § 338, subd. (a) [A three-year statute of limitations applies to "[a]n action upon a liability created by statute, other than a penalty or forfeiture"].) "Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant. (*Hibernia Sav. and Loan Soc. v. Farnham* (1908) 153 Cal. 578, 584; *Kahn v. Wilson* (1898) 120 Cal. 643, 644.)" (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.) By not raising that statute of limitations argument in his opening brief, he forfeited it. (See *People v. Mickel* (2016) 2 Cal.5th 181, 197.) Also, we note that Erich argues in his reply brief that the seventh cause of action "stands or fall with [his] other claims regarding his entitlement to the 25% carry" and that it survives as "a derivative claim" *if* we determine that the trial court should not have granted summary adjudication of his contract claims. That was not our determination. Furthermore, Erich has not shown that any liability for paying him a 25 percent share of the carry was created by statute as opposed to oral agreement.

existed as to whether the carry agreement was "part of a single employment contract between the parties."

Uncontradicted evidence presented by defendants and undisputed facts showed that Erich's compensation for his ongoing employment was established by oral agreement. According to Erich's declaration in opposition to summary judgment, Val and he "agreed that [he] would go on payroll effective January 1, 2004, and [he] would continue to receive $90,000 per year," and "Val said he would need more time to consider what [Erich's] share of the carry would be." Erich stated: "Because of the delay in getting [him] on payroll and because of [his] desire to move forward with the company, [he] spoke to Val several times between January and June 2004, including at least one time in March, about getting put on payroll and what percentage of profits [Val] was proposing for [his] work. Each time, [Val] promised to tell the accountant to add [him] to payroll and [indicated] that [Val] still needed time to decide what [Val] thought was a fair share of the profits for [him]." Erich further stated: "On May 15[, 2004], I was added to Outfitter's payroll. However, it was understood that Val and I did not yet have an agreement as to what my share of the carry would be . . . . In late May or early June, I again inquired with Val about my deal for carry, my back pay, and I also gave Val an expense report of my outstanding business expenses from 2002-2003 during the period when I was a consultant."

According to Erich's declaration, "Finally, on or about June 18, 2004, my brother came into my office to tell me that he thought about it, and that he was prepared to give me '25% of the carry' from our venture investments and that my share should vest over five years." In his declaration, Erich stated that "[b]ased on that promise, I continued to work for Outfitter Ventures for nearly six more years, thereby earning my 25% share of Outfitter Ventures' carry." He also asserted that "although my salary of $90,000 was well below market rate for someone with my qualifications and expertise, I felt that receiving 25% of the firm's carry compensated for my lower salary."

Even though Erich has maintained that his employment agreement and the carry agreement were two separate contracts, the alleged promises related to the same subject matter, namely Erich's continued employment, and involved the same parties. His declaration indicated that the promise to pay him a share of the carry was integral to his ongoing employment. Logically, the purpose of an employer's agreement to share profits with an employee is to induce the employee to continue employment and work harder to generate profits for the employer. (See *Horton v. Remillard Brick Co*. (1915) 170 Cal. 384, 390 (*per curiam*).

An employer may modify compensation and benefits provided to an employee over the course of the employee's employment. "[I]t is settled that an employer may unilaterally alter the terms of an employment agreement, provided such alteration does not run afoul of the Labor Code. [Citations.]" (*Schachter, supra*, 47 Cal.4th at p. 619.) "An 'employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.' [Citation.]" (*Id*. at p. 620.) Changes in the employment terms may become part of the employment contract. (See *Asmus*, *supra*, 23 Cal.4th at p. 15 ["Just as employers must accept the employees' continued employment as consideration for the original contract terms, employees must be bound by amendments to those terms, with the availability of continuing employment serving as adequate consideration from the employer"]; see Civ. Code, § 1642 ["Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."]; see also Civ. Code, §§ 1549, 1622.)

Once the defendants met their burden of showing that the causes of action had no merit because they were time barred, the burden shifted to Erich to show a triable issue of material fact. (§ 437c, subd. (p)(2).) Erich did not submit evidence sufficient to support a reasonable conclusion that there were two separate contracts, an oral employment

agreement and an oral carry agreement. (See *Aguilar*, *supra*, 25 Cal.4th at p. 850.) Thus, the evidence did not raise a triable issue of material fact.

7. *No Triable Issue Regarding Equitable Estoppel*

Erich also asserts that, in granting defendants' motion for summary adjudication based on the statute of limitations, the trial court erroneously rejected his assertion of the doctrine of equitable estoppel. He first argues that the trial court erred in concluding that he could not raise a triable issue based on a claim of equitable estoppel against a statute of limitations defense since the facts showing equitable estoppel had not been pleaded in the complaint.

"The materiality of a disputed fact is measured by the pleadings (*Turner v. Anheuser-Busch, Inc*. (1994) 7 Cal.4th 1238, 1252; 6 Witkin, Cal. Procedure (5th ed. 2008) Proceedings Without Trial, § 212, p. 650), which 'set the boundaries of the issues to be resolved at summary judgment.' [Citations.]" (*Conroy, supra,* 45 Cal.4th at p. 1250.) "[S]ummary judgment [or summary adjudication] cannot be *denied* on a ground not raised by the pleadings. [Citations.]" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663.) "If either party wishes the trial court to consider a previously unpleaded issue in connection with a motion for summary judgment, it may request leave to amend. [Citations.] Such requests are routinely and liberally granted. . . . ' " '[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.' " ' [Citation.]" (*Id*. at pp. 1663-1664.) Erich has not pointed to any request for amendment of his complaint to plead equitable estoppel against a statute of limitations defense.

In addition, the trial court granted summary adjudication of the breach of contract causes of action based upon Erich's failure to show a triable issue on the merits. "The statute of limitations operates in an action as an affirmative defense. [Citations.]" (*Norgart, supra,* 21 Cal.4th at p. 396.) If "[a] defendant establishes an affirmative defense to [a] cause of action," "the cause of action has no merit." (§ 437c, subd. (*o*)(2).)

"A defendant . . . has met his or her burden of showing that a cause of action has no merit if the party has shown . . . that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2).) "Once the defendant . . . has met that burden [by showing a complete defense to a cause of action], the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to [that] defense . . . ." (*Ibid*.; see *Jessen v. Mentor Corp*. (2008) 158 Cal.App.4th 1480, 1484-1485.) The plaintiff cannot rely upon a complaint's allegations "to show that a triable issue of material fact exists." (§ 437c, subd. (p)(2).) Rather, the plaintiff must "set forth the specific facts showing that a triable issue of material fact exists as to [that] defense . . . ." (*Ibid*.)

Erich contends that he presented sufficient evidence to raise a factual dispute as to whether he relied on Lilli's statements and whether defendants were equitably estopped from asserting a statute of limitations defense. Erich stated in his declaration, "Lilli Rey, always led me to believe, both in conversations and via email, that Outfitter would do right by me. Furthermore, she was encouraging Val to pay me a fair severance. Lilli always agreed that she and Val owed me 'a whole lot of money.' Following my termination and throughout the rest of 2010, I often sought clarification for Val's action from Lilli. Lilli and I exchanged at least 16 emails concerning my termination. We updated each other about our respective conversations with Val. Lilli continually reassured me that 2 months' severance and 6 months COBRA was not acceptable and that '. . . it will not end at this.' " Erich further stated that "[i]n May of 2010, Lilli assured me that she would not settle her divorce until it was clear that I received an adequate settlement and that my share of Outfitter's carry was adequately documented."

"A defendant whose conduct induced [a] plaintiff[] to refrain from filing suit within the [limitations] period might be equitably estopped to assert that the statute of limitations had expired." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 367.) It is a "venerable principle" that " ' "[o]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of

the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." ' [Citation.]" (*Id*. at p. 383; see Evid. Code, § 623.) " 'To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss." . . . "Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' [Citation.]" (*Atwater Elementary School Dist. v. California Dept. of General Services* (2007) 41 Cal.4th 227, 232-233.)

" 'Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. [Citations.]' (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) The detrimental reliance must be reasonable. (See *Lantzy v. Centex Homes, supra*, 31 Cal.4th at p. 384; *Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153.) 'The defendant's statement or conduct must amount to a misrepresentation bearing on the necessity of bringing a timely suit . . . . [Citations.]' (*Lantzy v. Centex Homes, supra*, 31 Cal.4th at p. 384, fn. 18.)" (*May v. City of Milpitas* (2013) 217 Cal.App.4th 1307, 1338.)

There can be no equitable estoppel if any of the elements is missing. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584.) In "the absence of a confidential relationship," "where the material facts are known to both parties and the pertinent provisions of law are equally accessible to them, a party's inaccurate statement of the law or failure to remind the other party about a statute of limitations cannot give rise to an estoppel." (*Jordan v. City of Sacramento* (2007) 148 Cal.App.4th 1487, 1496.)

In this case, Erich does not point to any evidence from which it could be reasonably inferred that his delay in filing the complaint beyond two years after the

September 2010 meeting was induced by any conduct or misrepresentation occurring after that meeting and bearing on the necessity of his filing a timely suit. Neither has Erich directed us to evidence that he had actually and reasonably relied upon the statements of Lilli, who apparently was in the process of marital dissolution in 2010, in delaying the filing of this lawsuit until December 2012. Erich has failed to show there is any triable issue of material fact regarding his claim that defendants were equitably estopped from asserting a statute of limitations defense.[18]

DISPOSITION

The judgment is affirmed.

[18] In light of our conclusions, section 437c, subdivision (m)(2), is not applicable. It is unnecessary to resolve Erich's remaining contentions, including his claim that there was a triable issue whether the term "carry" was fatally ambiguous.

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ELIA, J.

WE CONCUR:

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GREENWOOD, P. J.

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DANNER, J.

Vaden v. Outfitter Ventures LLC, et al.
H044130